Supreme Court of the United States

OCTOBER TERM, 1949.

No.

BERNICE B. FERES, as Executrix under the Last Will and Testament of Rudolph J. Feres, Deceased,

Petitioner,

against

THE UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Preliminary Statement.

The statement of matters involved, jurisdiction and questions presented appears in the petition for a writ of certiorari herein and in the interest of brevity are incorporated herein by reference.

Opinions Below.

The opinion of the Court of Appeals is attached to a transcript of the record (R. 13). It was rendered on the 4th of November, 1949, 177 Fed. 2d 535. The opinion of the District Court appears fully in the record which has been filed with this Court (R. 3).

Summary of Argument.

1. There is nothing in the wording of the Tort Claims Act, its purpose or legislative history to permit the Courts below to read into an Act a further exception that dependents of a deceased soldier are not entitled to recovery under the Act. The purpose of the Act was to relieve Congress from the consideration each year of the multitude of private bills for relief of dependents of military personnel and to have all claims decided by the Federal Court except those specifically excluded.

2. The authorities relied upon by the Court below are distinguishable and do not represent the law. These cases dealt with construction of a statute of limited application and not a statute of general application or a general waiver of immunity such as the Tort Claims Act.

3. Since this Court has held in the *Brooks* case that a soldier on furlough may sue under the Act, the decedent sleeping in a barracks in this country may be said to be under an equivalent status as a soldier on furlough.

If we assume that a soldier should not sue while a member of the Armed Services that disability does not apply to his dependents.

Furthermore, since the Tort Claims Act creates a right which becomes vested, this right cannot be considered supplanted by the privileges that a soldier or his dependents may obtain under pension systems which are gratuities.

The construction of the Act by the several Courts below has thrown the application of the Act into confusion and has created subtle distinctions and exceptions which Congress did not place in the Act and which would require further congressional action to place there.

The proximate cause of the decedent's death was the negligence of some third party, an employee of the Government, and not the performance of any duty as a soldier, or directly pertaining to his particular status at the time of the fatal injury.

POINT I.

There is nothing in the wording of the Act, its legislative history or purpose that permitted the Court below to read into the Act an exception that the legal representatives of a deceased soldier were not entitled to sue for the death of the soldier arising out of injuries received while assigned to and sleeping in a barracks in this country.

This Court in *Brooks v. United States*, 337 U. S. 49 (May 16, 1949), unequivocally stated (p. 51):

> "The statute's terms are clear. They provide for District Court jurisdiction over *any* claim founded on negligence brought against the United States. We are not persuaded that 'any claim' means 'any claim but that of servicemen.' The statute does contain twelve exceptions. Sec. 421. None exclude petitioners' claims. One is for claims arising in a foreign country. A second excludes claims arising out of combatant activities of the military or naval forces, or the Coast Guard, during time of war. These and other exceptions are too lengthy, specific, and close to the present problem to take away petitioners' judgments. Without resorting to an automatic maxim of construction, such exceptions make it clear to us that Congress knew what it was about when it used the term 'any claim.' It would be absurd to believe that Congress did not have the servicemen in mind in 1946, when this statute was passed. The overseas and combatant activities exceptions makes this plain."

Since the statutory language is clear and not ambiguous, the Court should leave it as it finds it and not undertake to modify or qualify its natural effect and meaning.

> "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms."
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> *Caminetti v. United States,* 242 U. S. 470, 485, 37 S. Ct. 192, 61 L. Ed. 442, 452.
> *Mackenzie v. Hare,* 239 U. S. 299, 309, 36 S. Ct. 106, 60 L. Ed. 297, 300.
> *Adams Express Company v. Kentucky,* 238 U. S. 190, 199, 35 S. Ct. 824, 59 L. Ed. 1267, 1270.
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> "(This) is not to construe the statute but to add an additional and qualifying term to its provisions. This we are not at liberty to do under the guise of construction, because, as this court has so often held, where the words are plain there is no room for construction."
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> *Osaka Shosen Kaisha Line v. United States,* 300 U. S. 98, 101; 57 S. Ct. 356; 81 L. Ed. 532, 534.

The proper viewpoint is well expressed, with citations of numerous authorities, in 50 Am. Jr., pp. 204-207, as follows:

> "A statute is not open to construction as a matter of course * * *. Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning * * * the court has no right to look for or impose another meaning. In the case of such unambiguity, it is the established policy of the courts to regard the statute as meaning what it says, and to avoid giving it any other construction than that which its words demand. The plain and obvious meaning of the

> language used is not only the safest guide to follow in construing it, but it has been presumed conclusively that the clear and explicit terms of a statute expresses the legislative intention, so that such plain and obvious provisions must control. A plain and unambiguous statute is to be applied, and not interpreted, since such a statute speaks for itself, and any attempt to make it clearer is a vain labor and tends only to obscurity."

In *Equitable Life Assurance Society v. Pettus*, 140 U. S. 226, 233; 35 L. Ed. 497, 500; 11 S. Ct. 822, 825, the Court said:

> "This construction is put beyond doubt by section 5986 which, by specifying four cases—in which the three preceding sections 'shall not be applicable' necessarily implies that those sections shall control all cases not so specified."

The specific exclusions, therefore, carry the implication that all claims not thus excluded may be successfully asserted.

Another statement of such rule arose in an action where the defense attempted to limit the right to recover against the sovereign for undisputed claims. Mr. Justice Cardozo, while sitting on the Court of Appeals of New York, said in *Anderson v. Hayes Construction Co.*, 243 N. Y. 140, 147; 153 N. E. 28, 29:

> "The exemption of the sovereign from suit involves hardship enough when consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced."

While a statute in derogation of sovereignty must be strictly construed (*United States v. Sherwood*, 312 U. S. 584, 61 Sup. Ct. 767, 85 L. Ed. 1058, 1941), the interpretation must not be so narrow as to defeat the statute's purpose (see *Canadian Aviator, Lim., v. United States*,

324 U. S. 215, 222, 65 Sup. Ct. 639, 643, 89 L. Ed. 901, 907, 1945; 3 Sutherland, Statutory Construction, sec. 6302, 3d Ed. Horack, 1943).

Mr. Justice Holmes in *United States v. Pulaski Co.*, 243 U. S. 105, stated (p. 106):

> "There is a strong presumption on that the literal meaning is the true one, especially as against a construction that is not interpretation, but perversion; that takes from the proviso its ostensible purpose to impose a condition precedent. • • •"

The Act is a general waiver of immunity intended to do away with the old practice of waiving sovereign immunity by special act.

No more involved refinement of construction can be imagined than that now urged by the Government in its efforts to avoid the inevitable results implicit in the *Brooks* decision.

The Government in effect says that Congress, having made detailed exclusions from the coverage of the Act, nevertheless really intended another important exclusion, but forgot or overlooked to write it in and that, therefore, the Court should do so by judicial fiat; that Congress, although it considered excluding all members of the Armed Forces from the coverage of the Act, nevertheless rejected such exclusion, but intended to exclude some, but forgot or overlooked doing so, and that, therefore, the Court must do so by judicial fiat; that Congress, while still considering the bill and envisaging certain dire consequences if all torts arising from combatant activities during time of war were included, therefore excluded such torts, but intended to exclude more, or rather intended to exclude a certain class of claimants, whether or not engaged in such combatant activities, but that Congress likewise forgot or overlooked doing this also, and that, therefore, the Court must do so by judicial fiat.

The legislative history precludes the construction put upon the Act by the Court below.

Utterly conclusive of the case would seem to be the fact that Congress specifically considered and deliberately rejected an exception having exactly the same effect as that which the Court below now writes into the Act. This is to be seen undeniably in the following circumstances:

The original predecessor of the Federal Tort Claims Act was a bill, H. R. 7236, introduced in the 76th Congress. It, like the present Law, provided for general waiver of the Government's immunity to tort suits and in it there were listed substantially the same twelve exceptions and exclusions which appear in the present Act. But in addition to these, there was at that time another exception proposed which would have excluded from the cover of the Act:

> "Any claim for which compensation is provided by the * * * World War Veterans' Act of 1924, as amended."

The theory of this exception, just as the Government now urges in support of the lower Court's decision in the present case, was that the World War Veterans' Act of 1924, as amended, confers certain governmental benefits, such as the right to compensation payments, upon all persons injured while in the armed services of the United States, and therefore such persons should not also have the benefit of a general statute permitting tort suits against the Government. The clear purpose and effect of the proposed exception was thus to exclude all members of the armed services from rights of action under the contemplated Statute. Conversely it seems to have been considered obvious (see Congressional Record, Vol. 86, Pt. II, 76th Congress, 3d Sess., 1940, pp. 12015-12032 and see also footnote, p. 212, *Jefferson v. United States*, 74 F. Supp. 209) that under the proposed Statute's general opening of

the way to tort suits against the Government, members of the armed services would be able to sue like all other persons unless some such exception was expressly written into the Statute. Though debated, the bill was of course not enacted by the 76th Congress.

In the 79th Congress, the same bill, retitled H. R. 181, was again introduced with all its exceptions including the additional or thirteenth exception quoted and discussed above. Congress again considered the Bill, *struck out of it the exception in question,* and enacted the remainder as the present Federal Tort Claims Act. Yet the Court below now sees fit to put back into the Statute the exact exception that Congress deliberately struck out of it! In this it is respectfully submitted, the Court exceeded its province.

The Federal Tort Claims Act, as its history partially outlined above indicates, was no hasty or ill-considered piece of legislation. And the Court below does wrong to treat it as if it were. The Court does wrong to assume that Congress was not aware of or did not comprehend what it was doing, even though it used words "crystal clear," when it enacted a Statute broad enough to include within its scope members of the armed services along with all other persons generally. The Court does wrong to assume that when Congress gave its attention to the subject of exceptions or exclusions from the Act and carefully etched out twelve such exceptions, it overlooked and failed to mention a thirteenth exception which it really intended. Certainly and above all the Court does wrong when it disregards the fact that Congress did consider such thirteenth exception. And for the Court to write the effect of that exception back into the Statute after Congress deliberately and specifically struck it out, is unjustifiable.

In the Report of the Joint Committee pursuant to H. Cong. Res. 18, 79th Congress, 2d Session, House Report No. 1675, it is stated at page 25:

"2. Delegation of Private Claims

Recommendation: That Congress delegate authority to the Federal courts and to the Court of Claims to hear and settle claims against the Federal Government; and that Government agencies and departments be empowered to handle local and private matters now provided for in private bills, such as private pension bills and legislation authorizing construction of bridges over navigable streams.

Congress is poorly equipped to serve as a judicial tribunal for the settlement of private claims against the Government of the United States. This method of handling individual claims does not work well either for the Government or for the individual claimant, while the cost of legislating the settlement in many cases far exceeds the total amounts involved.

Long delays in consideration of claims against the Government, time consumed by the Claims Committee of the House and Senate, and crowded private calendars combine to make this an inefficient method of procedure.

The United States courts are well able and equipped to hear these claims and to decide them with justice and equity both to the Government and to the claimants. We therefore recommend that *all claims for damages* against the Government be transferred by law to the United States Court of Claims and to the United States district courts for proper adjudication.

We further recommend that private pension bills and other bills dealing with purely local and private matters, including the authority to construct bridges over navigable streams, be delegated to the proper agencies of government for final determination." (Italics ours.)

In the Senate Report No. 1400 to accompany S.2177, at pages 18 and 19, it is stated:

> "Part 2. Provisions Applicable to Both Houses
> Section 121. Private bills banned
>
> This section bans private bills, resolutions, and amendments authorizing or directing the payment of property damages or personal injuries *or death or for pensions*; the construction of bridges across navigable streams; or the correction of military or naval records. It is provided, however, that the provisions of this section shall not apply to private bills or resolutions conferrring jurisdiction on the Federal courts to hear, determine, and render judgment in connection with private claims otherwise cognizable under the Federal Tort Claims Act if the claim accrued between January 1, 1939, and December 31, 1944, the last day being the day before the effective date (for the purpose of accrual of claims) of the Federal Tort Claims Act. This will permit consideration of bills or resolutions covering claims going back for a period of 6 years and would seem to be ample to prevent any inequities." (Italics ours.)

(p. 29):

> "Title IV-Federal Tort Claims Act
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> This title waives, with certain limitations, governmental immunity to suit in tort and permits suits on tort claims to be brought against the United States. It is complementary to the provision in title I banning private bills and resolutions in Congress, leaving claimants to their remedy under this title."

Therefore it seems evident to us that Congress wanted to rid itself of the consideration of the great number of private bills for relief of military personnel and their families presented at every session.

Several cases arising under the Act have been interpreted as its primary purpose or intention to relieve Congress of the burden of dealing by private acts Tort Claims

and construction put upon the Act by the Court below and the Government defeats that purpose.

United States v. South Carolina State Highway, 171 Fed. 2d 893.
State Farm Mutual Liability Insurance Co. v. United States, 172 Fed. 2d 737.

The position now assumed by the Government in litigation under the Act is at variance with the original purpose of the Act as so indicated by Congress.

For the first time in the history of this country has there been peace-time conscription and the present activities of the Federal Government reach corners never dreamt of by the founding fathers. It should not seem unusual that co-related with this extension of Government activity that there should be assumed Government liability and waiver of immunity from suit.

POINT II.

The decisions relied upon by the Court below are inapplicable.

The Circuit Court below in affirming specifically relied upon *Dobson v. United States*, 27 Fed. 2d 807, cert. d. 278 U. S. 653, and *Bradey v. United States*, 151 Fed. 2d 742, cert. d. 326 U. S. 795, as well as *Jefferson v. United States*, 77 Fed. Supp. 706.

This Court in alluding to the *Dobson* and *Bradey* cases stated in *Brooks v. United States* (p. 62) (96 L. Ed. p. 886):

> "But we are dealing with an accident which had nothing to do with the Brooks' army careers, injuries not caused by their service except in the sense that all human events depend upon what has already

transpired. Were the accident incident to the Brooks' service, a wholly different case would be presented. We express no opinion as to it, but we may note that only in its context do *Dobson v. United States*, 27 F. 2d 807, *Bradey v. United States*, 151 F. 2d 742, and *Jefferson v. United States*, 77 F. Supp. 706, have any relevance. See the similar distinction in 31 U. S. C. Sec. 223b. Interpretation of the same words may vary, of course, with the consequences, for those consequences may provide insight for determination of congressional purpose. *Lawson v. Suwanee Fruit & Steamship Co.*, 336 U. S. 198."

The decisions in the *Dobson* and *Bradey* cases are founded upon acts whose legislative history and purpose are no parallel to the Federal Tort Claims Act. The danger in drawing general conclusions from decisions under other statutes is admirably set forth by Mr. Justice Frankfurter in *Federal Trade Commission v. Bunte*, 312 U. S. 349, 353:

> "Translation of an implication drawn from the special aspects of one statute to a totally different statute is treacherous business."

The Court below in relying upon those two cases may have overlooked that the Tort Claims Act, Section 421 (d) provides:

> "(d) Any claim for which a remedy is provided by the Act of March 9, 1920 (U.S.C. title 46, secs. 741-752, inclusive), or the Act of March 3, 1925 (U.S.C., title 46, secs. 781-790, inclusive), relating to claims or suits in admiralty against the United States."

Thus, we must assume that Congress was aware of the decisions in the *Dobson* and *Bradey* cases because they expressly excluded all claims arising under the acts in those cases from the Tort Claims Act. We cannot assume that in making this exclusion they didn't know how the courts construed those acts.

It is, therefore, logical to assume when Congress came to write all the other exceptions they intended to include members of the Armed Forces except in those instances specifically excluded (i. e.) Subdivisions (j) and (k) and possibly (a) of Section 421.

Not only is there a serious difference of wording in the acts interpreted in the *Dobson* and *Bradey* cases but it must be important to bear in mind that the Federal Tort Claims Act represented a marked departure by the United States with respect to the waiving of sovereign immunity. It is the adoption of the trend of the last twenty-five years or more. The Federal Tort Claims Act is a comprehensive Act or general waiver of immunity. The acts interpreted in the *Dobson* and *Bradey* cases were special acts waiving immunity under certain conditions and to a limited extent.

The same view of the scope of the Act has been taken by the Circuit Court of Appeals for the Ninth Circuit in an opinion filed on April 8, 1948, in *Employees' Fire Insurance Co., et al., v. U. S.*, Civil Action No. 11743, 167 F. 2d 655. In reversing a District Court decision that an insurance company had no right of subrogation under the Act, the Circuit Court of Appeals said:

> "The words of the Act indicate a clear and sweeping waiver of immunity. * * * The Government has premised its position largely on the principle that statutes in derogation of sovereign immunity must be strictly construed. Where a statute contains a clear and sweeping waiver of immunity from suit on all claims with certain well defined exceptions, resort to that rule cannot be had in order to enlarge the exceptions."

POINT III.

The Tort Claims Act does not differentiate between injuries received by a member of the Armed Services while on furlough or in any other status and while on active duty.

The Court below assumed from the face of the pleadings that a soldier sleeping in a barracks away from the combatant areas and after hostilities ceased was under a status different than a soldier on furlough. The Court below also inferred that the proximate cause of the soldier's death in the case at bar was the performance of some act of duty.

We respectfully submit it cannot be assumed from the pleadings or from the facts alleged that his death was caused by an act "incident to * * * service."

In the *Brooks* case this Court did not define the phrase "incident to * * * service." It has, however, been defined by the Judge Advocate General's Department to mean " * * * while engaged in the actual performance of some official duty." See Judge Advocate General's School, Claims By and against The Government, 39 (text no. 8, 1944).

Furthermore, there is a distinction between the case at bar and the *Jefferson* case, *supra*. In the *Jefferson* case it was the soldier himself suing, while in the case at bar it is the widow of the soldier.

It may be that a soldier should be prohibited from suing while in the service as a matter of discipline. However, that disability, if it does exist, should not destroy any right he obtains by virtue of the Statute.

Very often penal statutes disable a convict from suing while under the disability of a sentence. The courts are almost universal in holding that such disability does not carry over to the convict's family or assignee and that the disability is personal to the convict and is removed when he is no longer under the consequences of his criminal sentence.

See:

Green v. State of New York, 278 N. Y. 15.
Bamman v. Erickson, 259 A. D. 1040, 21 N. Y. S. 2d 40.

Concededly, the plaintiff was and is not a member of the armed forces and whatever special status or disability her deceased husband had, no statute or rule of law grafts that same disability upon her.

The chief contention of the Government is that Congress must have intended to exclude members of the Armed Services (and their wives and dependents) because of the growth over the years of a system of pensions and benefits. This argument does not square up fully upon analysis. A reading of the several statutes mentioned does not seem to indicate that the allowances granted thereby are "rights," or that they will be allowed in all cases especially where the claim is that there is recurrence of a condition or injury received in time of war, 38 U. S. C., Sections 501 (a) and 501 (a-1).

Certain principles govern the determination whether the additional disability results from an injury or aggravation of an existing injury and the claimant must establish causation, 38 C. F. R. Cum. Supp., Section 2.1123 (b).

Although the Government may have been liberal in one sense, in a system of benefits and pensions, the system is not so all-inclusive and complete as to lend support to the contention that it is a complete substitute for a claim under the Federal Tort Act.

which they knew or should have known to be unsafe due to a defective heating plant and further negligence on the part of the fire guard assigned to the area in which the fire occurred and of the supervisors of the latter. Judge Brennan dismissed the complaint on the authority of *United States* v. *Brooks*, 169 F. 2d 840. That decision was by a divided court in the Fourth Circuit. The majority in an opinion by Judge Dobie, in which Judge Watkins concurred, held that there could be no recovery on behalf of two soldiers who while on furlough and taking a pleasure [fol. 15] drive suffered death and personal injury respectively through collision with an army truck. Judge Parker dissented on the ground that the language of the statute allowed suits by soldiers. The majority relied on the analogy to the decisions in this court refusing to allow naval personnel to recover damages under the Public Vessels Act. *Dobson* v. *United States*, 27 F. 2d 807, cert. den. 278 U. S. 653; *Bradey* v. *United States*, 151 F. 2d 742, 743, cert. den. 326 U. S. 795, rehearing den. 328 U. S. 880.

The Supreme Court reversed the Court of Appeals for the Fourth Circuit in an opinion by Justice Murphy [*Brooks* v. *United States*, 337 U. S. 49], from which Justices Frankfurter and Douglas dissented. The majority allowed recovery on the ground that the "accident to the soldiers had nothing to do with the Brooks' army careers," and added (at page 52), "were the accident due to the Brooks' service a wholly different case would be presented. We express no opinion as to it, but we may note that only in its context do *Dobson* v. *United States*, 27 F. 2d 807, *Bradey* v. *United States*, 151 F. 2d 742, and *Jefferson* v. *United States*, 77 F. Supp. 706, have any relevance. See the similar distinction in 31 U. S. C. § 223 b."

The Tort Claims Act provides that the United States shall be liable "in the same manner and to the same extent as a private individual under like circumstances * * *", 28 U. S. C. 2674. There are twelve exceptions to the Act,[1]

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[1] 28 U. S. C. *Exceptions.*

The provisions of this chapter and section 1346 (b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not

[fol. 16] but they relate to the cause of injury rather than to the character of a claimant who may seek to recover damages for his injuries. While they relieve the government in certain situations from liability to all persons including civilians, they do not mention soldiers specifically. There would seem to have been no reason for mentioning soldiers when the latter had not been treated as having claims for injuries incident to their service. See 31 U. S. C. § 223 b. [fol. 17] In the circumstances we see no reason for not adhering to the view we took as to damage claims of military personnel in *Dobson* v. *United States, supra* and *Bradey* v. *United States, supra,* and that which Judge Chesnut took in *Jefferson* v. *United States*, 77 F. Supp. 706, now on appeal in the Fourth Circuit. If more than the pension system had been contemplated to recompense soldiers engaged in military service we think that Congress would not have left such relief to be implied from the general terms of the Tort Claims Act, but would have specifically provided for it. The only exception to this interpretation of the statute which

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such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46 relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Any claim arising from injury to vessels, or to the cargo, crew, or passengers of vessels, while passing

seems to have been recognized by the Supreme Court in the *Brooks* case applied to situations where military personnel were not on active duty.

It might be though that our conclusion is somewhat weakened by the fact that when the Tort Claims Act was introduced in Congress, H. R. 181, 79th Cong., 1st Sess., it contained a thirteenth exception, making the Act inapplicable to "Any claim for which compensation is provided by the Federal Employees Compensation Act, as amended, or by the World War Veterans Act of 1924, as amended." This exception was omitted in the Act as finally passed. However, the Federal Employees Compensation Act, as amended, provided that as long as an employee is in receipt of compensation under that Act "he shall not receive from the United States any salary, pay or remuneration whatsoever except in return for services actually performed, and except pensions for service in the Army or Navy of the United States * * *" 5 U. S. C. A. § 759. And the World War Veterans Act of 1924, as amended, provided that "no other pension laws or laws providing for gratuities or payments in the event of death in the service" shall be applicable to disabilities or deaths made compensable under the Act. Consequently, it would seem that the explanation for the [fol. 18] omission of the thirteenth exception to the Tort Claims Act is that it was considered unnecessary. We do

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through the locks of the Panama Canal or while in Canal Zone waters.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

not, therefore, consider this omission sufficiently significant to require a result contrary to that we have reached.

For the foregoing reasons the order should be affirmed.

[fol. 19] UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 4th day of November one thousand nine hundred and forty-nine.

Present: Hon. Augustus N. Hand, Hon. Harrie B. Chase, Hon. Jerome N. Frank, Circuit Judges.

BERNICE B. FERES, as Executrix, etc., Plaintiff-Appellant,

v.

UNITED STATES, Defendant-Appellee.

Appeal from the District Court of the United States for the Northern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Northern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 20] [Endorsed:] United States Court of Appeals, Second Circuit. Bernice B. Feres, etc., v. United States. 61 Judgment. United States Court of Appeals, Second Circuit: Filed Nov. 4, 1949. Alexander M. Bell, Clerk.

[fol. 21] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 22] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 13, 1950

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Douglas took no part in the consideration or decision of this application.

[Endorsed:] Enter Morris Pouser. File No. 54,307, U. S. Court of Appeals, Second Circuit. Term No. 558. Bernice B. Feres, as Executrix under the Last Will and Testament of Rudolph J. Feres, Deceased, Petitioner, vs. The United States of America. Petition for writ of certiorari and exhibit thereto. Filed January 26, 1950. Term No. 558 O. T. 1949.